

Exhibit D

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 CASE NO. 08-01789-smb

4 - - - - - x

5 SECURITIES INVESTOR PROTECTION

6 CORPORATION

7 v.

8 BERNARD L. MADOFF INVESTMENT

9 SECURITIES, LLC, et al,

10 Debtors.

11 - - - - - x

12

13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York

16

17 April 18, 2017

18 2:05 PM

19

20

21 B E F O R E :

22 HON. STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: Unidentified

1 evidence of disbursements.

2 And then the trustee is asking me, as the fact
3 finder, to extrapolate backwards, if that's the right
4 phrase, and conclude or infer from that that even when there
5 are no corresponding records that the PW still stands for a
6 disbursement. And I don't know how the trustee proves that
7 except statistically.

8 MR. KIRBY: Okay. That would be great if they had
9 offered a statistician to support that claim.

10 THE COURT: Well, the -- I -- I think one of your
11 arguments, and I agree with it, is I would not permit -- and
12 maybe we're getting ahead of ourselves.

13 MR. KIRBY: Yeah.

14 THE COURT: I wouldn't accept testimony from Ms.
15 Collura or Mr. Greenblatt that it's reasonable to infer that
16 the records that are missing would prove the trustee's case.
17 It seems to me that's an inference I have to draw from the
18 evidence. They can tell me on how many instances the PW
19 notation matched the disbursement, what the universe of PW's
20 are and, you know, whatever other relative -- evidence may
21 be relevant to that determination. And then I will either
22 draw or not draw the inference that the trustee is asking me
23 to draw.

24 MR. KIRBY: As the finder of fact I agree.

25 THE COURT: Right.

1 there are -- the records are totally missed.

2 THE COURT: Well, you know, I would like to hear
3 from the forensic accountants on what they rely on. I know
4 that there are many cases where forensics accountants will
5 reconstruct fraudulent records. We wouldn't need forensic
6 accountants if we didn't have problems with fraudulent
7 records and I would like to know what it is they normally
8 rely on and how they go about doing what they do generally
9 and how they did what they did in this particular case.

10 MR. KIRBY: I can respect that that might be
11 appropriate, but what the experts have written in their
12 reports is that they're not relying on their reconstruction
13 of missing records. What they're relying on is an inference
14 that they've drawn from what missing records would show.
15 And that's -- that -- there's no foundation for.

16 THE COURT: But I said that I would or would not
17 draw that inference. They're going to tell me that they
18 found that correlation that we discussed, and they're going
19 to ask me -- the trustee's going to ask me to draw the
20 inference that PW means in all cases that that was an actual
21 disbursement.

22 MR. KIRBY: Right. And --

23 THE COURT: And that's what this is really about.

24 MR. KIRBY: Pardon.

25 THE COURT: And that's what this is really about.

1 THE COURT: I'm going to --

2 MR. KIRBY: -- further.

3 THE COURT: -- I'm going to hear the evidence.

4 It's a statistical case. And then I'm going to make a
5 determination about whether it's a reasonable inference of
6 the inference that they're asking what the experts have
7 drawn but really they're asking me to draw as a reasonable
8 inference.

9 MR. KIRBY: Okay. But as long as it's clear that
10 you're drawing the inference and not --

11 THE COURT: I'm going to --

12 MR. KIRBY: -- the experts.

13 THE COURT: -- take the -- I'm not going to --

14 MR. KIRBY: Okay, because they're not qualified --

15 THE COURT: I'm not going to -- I agree with you.
16 The experts can't tell me what's in non-existent or missing
17 --

18 MR. KIRBY: Okay.

19 THE COURT: -- documents.

20 MR. KIRBY: Okay. I --

21 THE COURT: Why don't you -- why don't you -- we
22 have four motions so --

23 MR. KIRBY: I know. Okay. We've made three
24 motions to deal first of all with the other records and
25 you've already -- we've talked about them. But I do think

1 THE COURT: -- because I've indicated what I --
2 how I think this should be decided.

3 But if the statute says the trustee is supposed to
4 determine net equity based on the books and records or other
5 evidence to his satisfaction, what else is he supposed to do
6 in a case like this except hire forensic accountants to try
7 and confirm what the books and records show?

8 MR. KIRBY: I understand the problem and the
9 plight of the trustee. And -- but I think the issue is, is
10 as an administrative matter the trustee has to do his best
11 shot, take his best shot at it. Then the way the rules work
12 is that the customer then must come forward with evidence
13 saying the trustee got it wrong. Once we've done that, now
14 the Court is faced with having to decide it and the
15 trustee's faced with having to deal with the evidentiary
16 rules because there's no presumption anymore. The
17 presumption is overcome.

18 And that's the issue that we are now before --
19 that's the issue that's before the Court and would be before
20 the Court at trial, whether the trustee has satisfied his
21 burden on an evidentiary basis to over -- to -- whether --
22 that the cash actually was withdrawn.

23 THE COURT: Thank you.

24 As I've indicated I want to hear the testimony of
25 the experts and I know that there are other people who were

1 deposed and will testify either through deposition or live
2 regarding how the trust -- how these books and records were
3 maintained, and particularly what the experts did.

4 The only thing I'll say which I'll repeat is I'm
5 not going to hear expert testimony that missing records
6 would contain certain entries or that it's reasonable to
7 infer that if you have a high correlation, therefore I can
8 -- I should infer that all PW entries represent cash
9 withdrawals. That's an inference that I can draw or not
10 draw. I doubt it's within the expertise of the forensic
11 accountants and, frankly, it doesn't help me at all.

12 So let's just leave it at that.

13 MR. KIRBY: Thank you.

14 THE COURT: Now I have the trustee's -- oh, I'm
15 sorry. You did -- you were also -- I sat you down, but you
16 also had a --

17 MS. CHAITMAN: I did. And if --

18 THE COURT: I realize you joined in the motion. I
19 shouldn't have --

20 MS. CHAITMAN: I actually --

21 THE COURT: -- been so --

22 MS. CHAITMAN: -- filed a separate motion.

23 THE COURT: Right.

24 MS. CHAITMAN: I also joined in.

25 THE COURT: Right.